

110TH CONGRESS
1ST SESSION

H. R. 3321

To update the Foreign Intelligence Surveillance Act of 1978, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

AUGUST 2, 2007

Mr. HOEKSTRA (for himself, Mr. BOEHNER, Mr. BLUNT, and Mr. PUTNAM) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Select Committee on Intelligence (Permanent Select), for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To update the Foreign Intelligence Surveillance Act of 1978,
and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. ADDITIONAL PROCEDURE FOR AUTHORIZING**
4 **CERTAIN ACQUISITIONS OF FOREIGN INTEL-**
5 **LIGENCE INFORMATION.**

6 The Foreign Intelligence Surveillance Act of 1978
7 (50 U.S.C. 1801 et seq.) is amended by inserting after
8 section 105 the following:

1 “CLARIFICATION OF ELECTRONIC SURVEILLANCE OF
2 PERSONS OUTSIDE THE UNITED STATES

3 “SEC. 105A. Nothing in the definition of electronic
4 surveillance under section 101(f) shall be construed to en-
5 compass surveillance directed at a person reasonably be-
6 lieved to be located outside of the United States.

7 “ADDITIONAL PROCEDURE FOR AUTHORIZING CERTAIN
8 ACQUISITIONS CONCERNING PERSONS LOCATED OUT-
9 SIDE THE UNITED STATES

10 “SEC. 105B. (a) IN GENERAL.—Notwithstanding
11 any other law, the Director of National Intelligence and
12 the Attorney General, may for periods of up to one year
13 authorize the acquisition of foreign intelligence informa-
14 tion concerning persons reasonably believed to be outside
15 the United States if the Director of National Intelligence
16 and the Attorney General determine, based on the infor-
17 mation provided to them, that—

18 “(1) there are reasonable procedures in place
19 for determining that the acquisition of foreign intel-
20 ligence information under this section concerns per-
21 sons reasonably believed to be located outside the
22 United States, and such procedures will be subject
23 to review of the Court pursuant to section 105C of
24 this act;

25 “(2) the acquisition does not constitute elec-
26 tronic surveillance;

1 “(3) the acquisition involves obtaining the for-
2 eign intelligence information from or with the assist-
3 ance of a communications service provider, custo-
4 dian, or other person (including any officer, em-
5 ployee, agent, or other specified person of such serv-
6 ice provider, custodian, or other person) who has ac-
7 cess to communications, either as they are trans-
8 mitted or while they are stored, or equipment that
9 is being or may be used to transmit or store such
10 communications;

11 “(4) a significant purpose of the acquisition is
12 to obtain foreign intelligence information; and

13 “(5) the minimization procedures to be used
14 with respect to such acquisition activity meet the
15 definition of minimization procedures under section
16 101(h).

17 This determination shall be in the form of a written cer-
18 tification, under oath, supported as appropriate by affi-
19 davit of appropriate officials in the national security field
20 occupying positions appointed by the President, by and
21 with the consent of the Senate, or the Head of any Agency
22 of the Intelligence Community, unless immediate action by
23 the Government is required and time does not permit the
24 preparation of a certification. In such a case, the deter-
25 mination of the Director of National Intelligence and the

1 Attorney General shall be reduced to a certification as
2 soon as possible but in no event more than 72 hours after
3 the determination is made.

4 “(b) SPECIFIC PLACE NOT REQUIRED.—A certifi-
5 cation under subsection (a) is not required to identify the
6 specific facilities, places, premises, or property at which
7 the acquisition of foreign intelligence information will be
8 directed.

9 “(c) SUBMISSION OF CERTIFICATION.—The Attorney
10 General shall transmit as soon as practicable under seal
11 to the court established under section 103(a) a copy of
12 a certification made under subsection (a). Such certifi-
13 cation shall be maintained under security measures estab-
14 lished by the Chief Justice of the United States and the
15 Attorney General, in consultation with the Director of Na-
16 tional Intelligence, and shall remain sealed unless the cer-
17 tification is necessary to determine the legality of the ac-
18 quisition under section 105B.

19 “(d) MINIMIZATION PROCEDURES.—An acquisition
20 under this section may be conducted only in accordance
21 with the certification of the Director of National Intel-
22 ligence and the Attorney General, or their oral instructions
23 if time does not permit the preparation of a certification,
24 and the minimization procedures adopted by the Attorney
25 General. The Director of National Intelligence and the At-

1 torney General shall assess compliance with such proce-
2 dures and shall report such assessments to the Permanent
3 Select Committee on Intelligence of the House of Rep-
4 resentatives and the Select Committee on Intelligence of
5 the Senate under section 108(a).

6 “(e) DIRECTIVE.—With respect to an authorization
7 of an acquisition under section 105B, the Director of Na-
8 tional Intelligence and Attorney General may direct a per-
9 son to—

10 “(1) immediately provide the Government with
11 all information, facilities, and assistance necessary
12 to accomplish the acquisition in such a manner as
13 will protect the secrecy of the acquisition and
14 produce a minimum of interference with the services
15 that such person is providing to the target; and

16 “(2) maintain under security procedures ap-
17 proved by the Attorney General and the Director of
18 National Intelligence any records concerning the ac-
19 quisition or the aid furnished that such person wish-
20 es to maintain.

21 “(f) COMPENSATION.—The Government shall com-
22 pensate, at the prevailing rate, a person for providing in-
23 formation, facilities, or assistance pursuant to subsection
24 (e).

1 “(g) FAILURE TO COMPLY.—In the case of a failure
2 to comply with a directive issued pursuant to subsection
3 (e), the Attorney General may invoke the aid of the court
4 established under section 103(a) to compel compliance
5 with the directive. The court shall issue an order requiring
6 the person to comply with the directive if it finds that the
7 directive was issued in accordance with subsection (e) and
8 is otherwise lawful. Failure to obey an order of the court
9 may be punished by the court as contempt of court. Any
10 process under this section may be served in any judicial
11 district in which the person may be found.

12 “(h) REVIEW OF PETITIONS.—(1)(A) A person re-
13 ceiving a directive issued pursuant to subsection (e) may
14 challenge the legality of that directive by filing a petition
15 with the pool established under section 103(e)(1).

16 “(B) The presiding judge designated pursuant to sec-
17 tion 103(b) shall assign a petition filed under subpara-
18 graph (A) to one of the judges serving in the pool estab-
19 lished by section 103(e)(1). Not later than 48 hours after
20 the assignment of such petition, the assigned judge shall
21 conduct an initial review of the directive. If the assigned
22 judge determines that the petition is frivolous, the as-
23 signed judge shall immediately deny the petition and af-
24 firm the directive or any part of the directive that is the
25 subject of the petition. If the assigned judge determines

1 the petition is not frivolous, the assigned judge shall, with-
2 in 72 hours, consider the petition in accordance with the
3 procedures established under section 103(e)(2) and pro-
4 vide a written statement for the record of the reasons for
5 any determination under this subsection.

6 “(2) A judge considering a petition to modify or set
7 aside a directive may grant such petition only if the judge
8 finds that such directive does not meet the requirements
9 of this section or is otherwise unlawful. If the judge does
10 not modify or set aside the directive, the judge shall imme-
11 diately affirm such directive, and order the recipient to
12 comply with such directive.

13 “(3) Any directive not explicitly modified or set aside
14 under this subsection shall remain in full effect.

15 “(i) APPEALS.—The Government or a person receiv-
16 ing a directive reviewed pursuant to subsection (h) may
17 file a petition with the Court of Review established under
18 section 103(b) for review of the decision issued pursuant
19 to subsection (h) not later than 7 days after the issuance
20 of such decision. Such court of review shall have jurisdic-
21 tion to consider such petitions and shall provide for the
22 record a written statement of the reasons for its decision.
23 On petition for a writ of certiorari by the Government or
24 any person receiving such directive, the record shall be

1 transmitted under seal to the Supreme Court, which shall
2 have jurisdiction to review such decision.

3 “(j) PROCEEDINGS.—Judicial proceedings under this
4 section shall be concluded as expeditiously as possible. The
5 record of proceedings, including petitions filed, orders
6 granted, and statements of reasons for decision, shall be
7 maintained under security measures established by the
8 Chief Justice of the United States, in consultation with
9 the Attorney General and the Director of National Intel-
10 ligence.

11 “(k) SEALED PETITIONS.—All petitions under this
12 section shall be filed under seal. In any proceedings under
13 this section, the court shall, upon request of the Govern-
14 ment, review ex parte and in camera any Government sub-
15 mission, or portions of a submission, which may include
16 classified information.

17 “(l) LIABILITY.—Notwithstanding any other law, no
18 cause of action shall lie in any court against any person
19 for providing any information, facilities, or assistance in
20 accordance with a directive under this section.

21 “(m) RETENTION OF DIRECTIVES AND ORDERS.—A
22 directive made or an order granted under this section shall
23 be retained for a period of not less than 10 years from
24 the date on which such directive or such order is made.”.

1 **SEC. 2. SUBMISSION TO COURT REVIEW AND ASSESSMENT**
2 **OF PROCEDURES.**

3 The Foreign Intelligence Surveillance Act of 1978
4 (50 U.S.C. 1801 et seq.) is further amended by inserting
5 after section 105B the following:

6 “SUBMISSION TO COURT REVIEW OF PROCEDURES

7 “SEC. 105C. (a) No later than 120 days after the
8 date of the enactment of this section, the Attorney General
9 shall submit to the Court established under section 103(a),
10 the procedures by which the Government determines that
11 acquisitions conducted pursuant to section 105B do not
12 constitute electronic surveillance. The procedures sub-
13 mitted pursuant to this section shall be updated and sub-
14 mitted to the Court on an annual basis.

15 “(b) No later than 180 days after the date of the
16 enactment of this section, the court established under sec-
17 tion 103(a) shall assess the Government’s determination
18 under section 105B(a)(1) that those procedures are rea-
19 sonably designed to ensure that acquisitions conducted
20 pursuant to section 105B do not constitute electronic sur-
21 veillance. The courts review shall be limited to whether
22 the Government’s determination is clearly erroneous.

23 “(c) If the court concludes that the determination is
24 not clearly erroneous, it shall enter an order approving
25 the continued use of such procedures. If the court con-
26 cludes that the determination is clearly erroneous, it shall

1 issue an order directing the Government to submit new
2 procedures within 30 days or cease any acquisitions under
3 section 105B that are implicated by the court's order.

4 “(d) The Government may appeal any order issued
5 under subsection (c) to the court established under section
6 103(b). If such court determines that the order was prop-
7 erly entered, the court shall immediately provide for the
8 record a written statement of each reason for its decision,
9 and, on petition of the United States for a writ of certio-
10 rari, the record shall be transmitted under seal to the Su-
11 preme Court of the United States, which shall have juris-
12 diction to review such decision. Any acquisitions affected
13 by the order issued under subsection (c) of this section
14 may continue during the pendency of any appeal, the pe-
15 riod during which a petition for writ of certiorari may be
16 pending, and any review by the Supreme Court of the
17 United States.”.

18 **SEC. 3. REPORTING TO CONGRESS.**

19 The Foreign Intelligence Surveillance Act of 1978
20 (50 U.S.C. 1801 et seq.) is further amended by inserting
21 after section 105C the following:

22 “REPORTING TO CONGRESS

23 “SEC. 105D. On a semi-annual basis the Attorney
24 General shall inform the Select Committee on Intelligence
25 of the Senate, the Permanent Select Committee on Intel-
26 ligence of the House of Representatives, the Committee

1 on the Judiciary of the Senate, and the Committee on the
2 Judiciary of the House of Representatives, concerning ac-
3 quisitions under this section during the previous six-month
4 period. Each report made under this section shall in-
5 clude—

6 “(1) a description of the incidents of noncompli-
7 ance with a directive issued by the Attorney General
8 and the director of national intelligence under sec-
9 tion 105B to include—

10 “(A) incidents of noncompliance by an ele-
11 ment of the Intelligence Community with guide-
12 lines or procedures established for determining
13 that the acquisition of foreign intelligence au-
14 thorized by the Attorney General and Director
15 of National Intelligence concerns persons rea-
16 sonably to be outside the United States; and

17 “(B) incidents of noncompliance by a spec-
18 ified person to whom the Attorney General and
19 Director of National Intelligence issue a direc-
20 tive under this section; and

21 “(2) the number of certifications and directives
22 issued during the reporting period.”.

1 **SEC. 4. TECHNICAL AMENDMENT AND CONFORMING**
2 **AMENDMENTS.**

3 (a) Section 103(e) of the Foreign Intelligence Surveil-
4 lance Act of 1978 (50 U.S.C. 1801 et seq.) is amended—

5 (1) in paragraph (1), by striking “501(f)(1)”
6 and inserting “105B(h) or 501(f)(1)”; and

7 (2) in paragraph (2), by striking “501(f)(1)”
8 and inserting “105B(h) or 501(f)(1)”.

9 (b) TABLE OF CONTENTS.—The table of contents in
10 the first section of the Foreign Intelligence Surveillance
11 Act of 1978 (50 U.S.C. 1801 et seq.) is amended by in-
12 serting after the item relating to section 105 the following:

“105A. Clarification of electronic surveillance of persons outside the United
States.

“105B. Additional procedure for authorizing certain acquisitions concerning per-
sons located outside the United States.

“105C. Submission to court review of procedures.

“105D. Reporting to Congress.”.

13 **SEC. 5. LIABILITY DEFENSE.**

14 (a) IN GENERAL.—Notwithstanding any other law,
15 and in addition to the immunities, privileges, and defenses
16 provided by any other source of law, no action shall lie
17 or be maintained in any court, and no penalty, sanction,
18 or other form of remedy or relief shall be imposed by any
19 court or any other body, against any person for the alleged
20 provision to an element of the intelligence community of
21 any information (including records or other information
22 pertaining to a customer), facilities, or any other form of

1 assistance, during the period of time beginning on Sep-
2 tember 11, 2001, and ending on the date that is the effec-
3 tive date of this Act, in connection with any alleged classi-
4 fied communications intelligence activity that the Attorney
5 General or a designee of the Attorney General certifies,
6 in a manner consistent with the protection of State se-
7 crets, is, was, would be, or would have been intended to
8 protect the United States from a terrorist attack. This
9 section shall apply to all actions, claims, or proceedings
10 pending on or after the effective date of this Act.

11 (b) JURISDICTION.—Any action or claim described in
12 subsection (a) that is brought in a State court shall be
13 deemed to arise under the Constitution and laws of the
14 United States and shall be removable pursuant to section
15 1441 of title 28, United States Code.

16 (c) DEFINITIONS.—In this section:

17 (1) INTELLIGENCE COMMUNITY.—The term
18 “intelligence community” has the meaning given the
19 term in section 3(4) of the National Security Act of
20 1947 (50 U.S.C. 401a(4)).

21 (2) PERSON.—The term “person” has the
22 meaning given the term in section 2510(6) of title
23 18, United States Code.

1 **SEC. 6. EFFECTIVE DATE; TRANSITION PROCEDURES.**

2 (a) Except as otherwise provided, the amendments
3 made by this Act shall take effect immediately after the
4 date of the enactment of this Act.

5 (b) Notwithstanding any other provision of this Act,
6 any order in effect on the date of enactment of this Act
7 issued pursuant to the Foreign Intelligence Surveillance
8 Act of 1978 (50 U.S.C. 1801 et seq.) shall remain in effect
9 until the date of expiration of such order, and, at the re-
10 quest of the applicant, the court established under section
11 103 (a) of such Act (50 U.S.C. 1803(a)) shall reauthorize
12 such order as long as the facts and circumstances continue
13 to justify issuance of such order under the provisions of
14 the Foreign Intelligence Surveillance Act of 1978, as in
15 effect on the day before the applicable effective date of
16 this Act. The Government also may file new applications,
17 and the court established under section 103(a) of the For-
18 eign Intelligence Surveillance Act of 1978 (50 U.S.C.
19 1803(a)) shall enter orders granting such applications
20 pursuant to such Act, as long as the application meets
21 the requirements set forth under the provisions of such
22 Act as in effect on the day before the effective date of
23 this Act. At the request of the applicant, the court estab-
24 lished under section 103(a) of the Foreign Intelligence
25 Surveillance Act of 1978 (50 U.S.C. 1803(a)), shall extin-
26 guish any extant authorization to conduct electronic sur-

1 veillance or physical search entered pursuant to such Act.
2 Any surveillance conducted pursuant to an order entered
3 under this subsection shall be subject to the provisions of
4 the Foreign Intelligence Surveillance Act of 1978 (50
5 U.S.C. 1801 et seq.), as in effect on the day before the
6 effective date of this Act.

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